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HAROLD B. WILL

No. 776.

IN THE

SUPREME COURT OF THE UNITED STATES.

..... TERM, 1955.

PACIFIC EMPLOYERS INSURANCE COMPANY,
a Corporation,
Petitioner,

vs.

HAROLD B. WACKERLE and EVELYN WACKERLE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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QUESTION PRESENTED.

Respondents submit that the Statement of the Question Presented contained in the Petition is inaccurate. The Court of Appeals did **not** hold, as alleged, that the Automobile Substitution Endorsement was not a "new contract"

between the parties, but rather held that under the Missouri law (a) the Driver Exclusion Endorsement was void for want of consideration; (b) the Automobile Substitution Endorsement by its own terms was upon the **same terms and conditions** as the original policy and, therefore, the Driver Exclusion Endorsement, being void from its inception for want of consideration, was not a valid term and condition of the original policy and could not become a legally effective term and condition of the policy by reason of the execution of the Automobile Substitution Endorsement even if the latter were regarded as a "new contract"; and (c) the additional premium paid for the Automobile Substitution Endorsement was paid for comprehensive and collision coverage on the new automobile and did not constitute consideration for the Driver Exclusion Endorsement. Thus, the only question before this court is: **Did the Court of Appeals err in holding that under the Missouri law the Driver Exclusion Endorsement was void for want of consideration and that neither the Automobile Substitution Endorsement itself, nor the additional premium paid by the insured to the company in connection therewith, supplied a consideration for the Driver Exclusion Endorsement?**

STATEMENT OF THE CASE.

Respondents desire to correct certain inaccuracies in and supply certain omissions from Petitioner's Statement of the Case.

The policy in question was issued for a period of one year from November 15, 1952 for a total premium of $146.16 which was paid by the insured at the time the policy was issued (R. 6). No part of this premium was ever returned to the policyholder (R. 6).

The policy made no reference to any rating scale or classification system the Company might have had, but merely

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stated the amounts of the premiums charged for the various coverages afforded (R. 6). The policy gave the Company no right to raise or charge any additional premium for the coverages afforded by the policy (R. 6). Because the policy contained no reference to any rating scale or classification system and because it gave the Company no right to raise or charge an additional premium under any circumstances, Respondents objected to all of the evidence offered in connection therewith on the grounds that the policy was a written contract and that such evidence would violate the parol evidence rule and would be wholly irrelevant (R. 15, 17).

The policy gave the Company the right to cancel at any time upon five days notice and upon return of the unearned premium (R. 8).

As issued, the policy covered anyone operating the insured automobile with the permission of the Named Insured (R. 7). At the time of the collision with Respondents, the insured automobile was being operated by the Named Insured's son with her permission (R. 2, 3).

The Driver Exclusion Endorsement purported to be effective from and after January 26, 1953, which was during the policy period (R. 8).

The Automobile Substitution Endorsement (copy attached to Record at page 10) was issued under the Newly Acquired Automobile provision contained in the policy (R. 7). It was dated May 22, 1953 and substituted the new automobile for the old one under the policy (R. 10). It contained the following express provision:

> "Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions or limitations of the undermentioned Policy other than as above stated" (R. 10).

Statements are made by Petitioner in its Petition that the "Casualty and Surety Rate Regulatory Law" of Missouri "regulates and prescribes" the rates charged in Missouri for casualty insurance (Petition 4, 8). This is highly misleading, for the specific rates are in no sense prescribed or fixed by the State of Missouri, as the regulation goes only to the extent that rates may be neither excessive, inadequate nor unfarily discriminatory.* Within these broad limits, rates are fixed solely by the insurance companies themselves.

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* 1949 R. S. Mo., 379.470: "(1) Rates shall not be excessive or inadequate, as herein defined, nor shall they be unfairly discriminatory;".

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ARGUMENT.

I.

The Decision Below Is Clearly Correct.

Petitioner alleges that this court should grant certiorari because "the 8th Circuit Court of Appeals failed to follow the Missouri law in this case". Petitioner further alleges that the **Rice** case (discussed infra), upon which the Court of Appeals principally based its decision is not controlling because it is not a decision of the Supreme Court of Missouri.

Although it is true that certiorari will or may be granted if a Court of Appeals decides an important question of state law in conflict with local decisions, no such conflict has been shown in this case.

The precise issue that is now before this court has been carefully considered and decided adversely to Petitioner by the Kansas City Court of Appeals in **Rice v. Provident Life and Accident Insurance Company**, 231 Mo. App. 560, 102 S. W. 2d 147. There the court held squarely that an endorsement reducing the coverage on a health and accident insurance policy that was placed on the policy with the knowledge and consent of the insured was void for want of consideration. Precisely the same arguments that were used in the **Rice** case (and rejected) were used by petitioner in this case and similarly rejected. As an indication of the extent to which the law of Missouri is well settled on this question, the court, in affirming an award for vexatious refusal to pay, said (l. c. 151):

> "The legal question here presented as to the validity of a rider to be attached to the policy in question is one to be determined by the application of principles

> of general law long established, about which there can be no reasonable ground for difference. The general law has long been that there must be a mutual consideration for a contract between two parties."

The **Rice** case is a square holding by the Kansas City Court of Appeals that the endorsement in question is invalid. No Missouri case holds to the contrary and this court has many times ruled that an announcement of state law by an intermediate Appellate State Court must be accepted by Federal Courts in the absence of convincing evidence that the law of the state is otherwise. See, for example, **Six Companies of California v. Joint Highway District No. 13 of State of California**, 311 U. S. 180, 61 S. Ct. 186, 85 L. Ed. 114, reh. den., 311 U. S. 730, 61 S. Ct. 438, 85 L. Ed. 475.

Nor is the **Rice** case the only precedent for the lower court's decision. The question of the validity of a similar endorsement was before the 8th Circuit Court in **Mutual Benefit Health and Accident Assn. v. Cohen** (1952), 194 F. 2d 232. There too, the 8th Circuit held the rider involved void for want of consideration. Certiorari was petitioned in the **Cohen** case and denied. 343 U. S. 965, 96 L. Ed. 1362, 72 S. Ct. 1059.

Other Missouri cases that are in accord with the rule of the **Rice** case are **Patterson v. American Insurance Company**, 164 Mo. App. 157, 148 S. W. 448 and **Baker v. Sovereign Camp W. O. W.**, 233 Mo. App. 13, 116 S. W. 2d 513. The **Patterson** case involved a vacancy permit under a fire insurance policy. The court, in holding that testimony of the plaintiff to an alleged oral contract with the company's agent was inadmissible, stated during the course of the opinion that:

> "Parties who make a contract have the power to modify it by a subsequent agreement, but there must

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be a sufficient consideration for the modification to give it contractural force."

Cases in other jurisdictions holding riders to insurance policies void for want of consideration are **Maryland Casualty Company v. First National Bank of Atlanta, Texas** (C. C. A. 5th), 82 F. 2d 465 (robbery policy), and **American Casualty and Life Company v. Mason** (Tex. Civ. App.), 244 S. W. 2d 691 (health and accident policy).

Aside from the foregoing, however, it is clearly apparent that the decision of the lower court was correct. Under the undisputed facts, the policy, when written, provided coverage under the omnibus clause while the automobile was being operated by insured's son with her permission (R. 7). This coverage was a valuable right that had been paid for by the policyholder when she paid the original premium for the policy. By paying the premium she had fully performed her part of the insurance contract, and as to her, the contract was completely executed. As to the insurance company, however, it was wholly executory and would remain so until payment after loss. With this analysis of the situation, what right, during the term of the policy, would the insurance company have to reduce the coverage that it had already demanded and received a premium for, without in some way, either by a return of a portion of the premium or otherwise, compensating the insured for such reduction in coverage? The Driver Exclusion Endorsement itself was obviously of no benefit to her, because it reduced the coverage she had already paid for and gave her nothing. The company returned no part of her premium (R. 17). Nor did the company suffer any legal detriment in not extracting an additional premium from the insured, because the policy gave it no right to any such additional premium. **Rice v. Provident Life and Accident Company** (supra).

Under such circumstances as these, the Missouri courts have consistently held that an agreement by a party to a contract who has fully performed his part of the contract, to modify the still executory promises of the other party, solely to the other party's advantage, is wholly ineffectual unless supported by some additional consideration. In **Stoedter v. Turner et al.** (Mo. App.), 237 S. W. 141, the court said (l. c. 144):

> "There can be no doubt that parties to a contract may lawfully rescind, abrogate, or terminate the same. And where the contract is wholly executory, it may be rescinded or set aside by mutual agreement of the parties; no other consideration being necessary. But a voluntary giving up or surrender of a valuable right accrued under a contract is ineffectual unless supported by a valuable consideration."

To the same effect is **Renner v. Luchow** (Mo. App.), 280 S. W. 77, 78; and see also: **Curry v. Boeckeler Lumber Co.**, 224 Mo. App. 336, 27 S. W. 2d 473; **Wilt v. Hammond**, 179 Mo. App. 406, 165 S. W. 362; **José et al. v. Aufderheide**, 222 Mo. App. 524, 293 S. W. 476; 17 C. J. S. 883, Contracts, Sec. 391, and 12 Am. Jur., Contracts, Sec. 407 et seq. We know of no Missouri cases holding to the contrary.

The cases cited by petitioner announcing the rule as to substituted contracts have no application here for three reasons. First, if the Automobile Substitution Endorsement be regarded as a new contract (because it changed a term of the old, i. e., the automobile covered) it could not have the effect of imparting validity to the prior Driver Exclusion Endorsement because by its own terms it was not intended to have any effect upon the policy except to substitute automobiles. Second, because under Missouri law, as announced in the **Rice** case, the Driver Exclusion Endorsement, to be valid at all, must have been valid at the time of its execution and could not become

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so at some future time. The court, in the **Rice** case, said (l. c. 151):

> "It is true that those who make a contract may unmake it or substitute another, either wholly or partially inconsistent; but the validity of the substituted contract must be determined, like that of any other, in the light of the situation existing at the hour of its making. If valid then, it will supersede or modify the first to the extent that the two will be unable to stand together."

The third reason why the rule as to substituted contracts has no application here is that the rule by its own terms states that "the substitution of a new contract for an old contract while still unperformed is a sufficient consideration for the NEW contract" (from **Avellone** case quoted on page 11 of the Petition). Here the question is not the consideration for the **new** contract (the Automobile Substitution Endorsement) but the alleged **old** contract (the prior Driver Exclusion Endorsement). And see discussion in opinion of lower court on pages 26-29 of Petition.

The remainder of the cases cited by petitioner either state abstract propositions of law about which we have no quarrel or they involve facts and issues entirely dissimilar to those here involved. Petitioner has not pointed to a single Missouri case, much less a Missouri Supreme Court case, that is in conflict with the decision of the lower court. It has thus failed to show the existence of a conflict with the Missouri law as a basis for granting certiorari.

II.

There Is No Conflict Between Circuits.

Supreme Court Rule 19 1 (b) states that one of the considerations governing review on certiorari is "Where a Court of Appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter." Petitioner does not allege the existence of any such conflict, but alleges instead that "The decision is in conflict with the rule pronounced in prior decisions of the Circuit Court of Appeals for the Eighth Circuit" and then cites a rule for decision adopted by the Eighth Circuit to the effect that it will give great weight to the decision of the trial court and will not reverse unless it is convinced that the decision of the trial court was induced by a "clear misconception or misapplication of the law."

We submit that such an alleged "conflict" by a Court of Appeals with its own prior decisions would not be grounds for certiorari. A court of appeals has full power to overrule its own prior decisions and it certainly has full power to refuse to follow a rule of decision adopted by it, or, for that matter, to abolish the rule altogether. But we further submit, that the Eighth Circuit followed the foregoing rule in its decision in this case, because the holding by the trial judge that the payment of an additional premium for the Automobile Substitution Endorsement *by the insured* **to the company** (passing, as it does, to the wrong party) is a sufficient consideration to support the Driver Exclusion Endorsement which reduced the benefits that she had already paid for under the policy, is clearly a "misconception" of law!

The facts in this case were undisputed. The only issue before the lower court was the validity of the Driver Exclusion Endorsement—a pure question of law. The

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Court of Appeals was in as good a position to decide this question of law as the trial judge. They were not bound by his decision. **Flannery Bolt Co. v. Flannery** (CCA 3rd), 86 F. 2d 43, 36 CJS 339, Sec. 297a; **Exmoor Country Club v. United States** (CCA 7th), 119 F. 2d 961; **Bogardus v. Commissioner,** 302 U. S. 34, 58 S. Ct. 61, 82 L. Ed. 32.

III.

There Is No Important Question of Federal Law.

Supreme Court Rule 19, 1 (b) states that one of the considerations governing review on certiorari is "When a court of appeals . . . has decided an important question of federal law which has not been, but should be, settled by this court." Petitioner does not allege the existence of any such question, but asserts instead that "This case is of sufficient importance in the commercial field of liability insurance contract law to elicit certiorari." We submit that upon analysis of the factual situation and the opinion of the lower court, this assertion loses substance.

In the first place, the Court of Appeals did not hold that an insurance company may not use a rider or endorsement to alter the coverage under an automobile liability insurance policy with the consent of the insured and without the repayment of a part of the premium. What the court **did** hold was that a company cannot, during the term of its policy, reduce the coverage that it has afforded in the policy and for which it has been paid in advance, with the naked consent of the insured alone, unsupported by any consideration. This, as we have already shown, is in accordance with the law of the State of Missouri and is a just, fair and reasonable holding.

In the second place, the decision will not in any way hamper the lawful operations of any legitimate insurance

company in a similar situation. If the company does not want to assume the risk of liability for operation of an insured automobile by a particular driver, and it has an agreement with the policyholder to exclude him, when it issues the original policy it can legally exclude him in the policy itself or in an endorsement issued **with** the policy (the endorsement then being considered a part of the original policy) and if the premium is paid for the policy so issued and the policy is accepted by the policyholder, the exclusion will be fully effective. On the other hand, if, after the original policy is written without any such driver exclusion, the company later discovers or decides that it will be exposed to a greater risk of liability by reason of the operation of the insured automobile by a particular driver than the company desires to assume, the company, in its own policy, has provided itself with a completely adequate remedy: it may cancel the policy and return the unearned portion of the premium to the insured. Furthermore, if, after cancellation, the former insured will agree to it and pay for it, the company may issue a new policy containing the driver exclusion provision it desires. Additionally, if the company prefers to handle the matter by rider, as in this case, rather than by cancellation, it can return a part of the original premium to the policyholder as a consideration for its limiting the coverage.

Instead of doing any of these things, however, this company issued its unrestricted policy for a term of one year in consideration of the payment of the premium set by it and then, during the life of the policy, unlawfully attempted by means of the endorsement in question, to modify the original contract to its own advantage by reducing its exposure to liability without at the same time offering any compensation or consideration to the policyholder. This the Missouri law proscribes.

In summary, we submit that the decision of the lower court is sound, logical and clearly correct under the Mis-

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souri law. Petitioner has failed to point to a single case holding to the contrary; it has shown no conflict between circuits; it has shown no important federal question that should be settled. In short, it has failed to show the existence of any ground whatsoever for the granting of certiorari.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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